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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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ISSUES PRESENTED

The Fair Labor Standards Act's 29 U.S.C. §201 et seq., ("FLSA") hours of work standard protects the health and safety of and generates jobs for working people. This case presents an issue relating to the breadth of coverage of the FLSA, specifically --

> Should the FLSA salary basis "subject to" pay docking, 29 C.F.R. § 541.118(a), and "window of correction," 29 C.F.R. §541.118(a)(6), rules be construed narrowly to limit employer access to exemptions from the national hours of work standard codified in the Act;
>
> Or, should exemptions be allowed for an employer who purposely adopts rules or codes of conduct which expressly state that employees are "subject to" impermissible deductions, makes post-litigation promises to reimburse any impermissible deductions conditioned upon an order from a court and revokes only a portion of the offending rule or disciplinary code?

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THE *AMICUS CURIAE* NATIONAL EMPLOYMENT LAW PROJECT AND THEIR INTEREST

The *amicus* National Employment Law Project ("NELP") is a non-profit advocate for the employment rights of the working poor and the unemployed. The *amicus* has obtained consent from both parties to file this brief. It supports the Petitioners.

For over 25 years, NELP has worked with state and local advocates around the country, including legal services offices, community groups, and labor organizations to achieve strong workplace protections and access to government systems of support for low-wage workers and the unemployed. In addition, NELP has a long history of litigation and policy advocacy on a broad range of issues, including job training, employment discrimination, unemployment compensation, the employment rights of workfare participants, the Family and Medical Leave Act, and the FLSA.

In 1993, NELP formed the Employment Task Force, a nationwide network of advocates representing low wage workers and the unemployed.

NELP and its constituents have a direct and sustained interest in continued strict enforcement of a national hours-of-work standard and the narrow application of FLSA exemptions which is essential to coverage of low-wage workers who comprise a disproportionate and growing share of the workforce.

If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will give this exempted portion of the workforce extra

work, since they are essentially "free labor." And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker.

STATEMENT OF THE CASE

The Petitioners in this case are 289 police Sergeants and one Lieutenant of the St. Louis Police Department. The Department treats the Petitioners as FLSA exempt employees.

The Department's Police Manual expressly provides that all Petitioners are "subject to" disciplinary suspension of less than a full work period for infractions of over 40 non-safety related rules. See Pet. App. G, 102a. In fact, Sergeants in the Department are suspended for periods of less than one week for disciplinary reasons. J.A. 48-57, 60-62, 85-87.

The Petitioners brought this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988. Pet. App. 68a-102a. On August 26, 1994, the District Court found that all of the Sergeant's positions except two were exempt. Pet. App. 67a-68a. On September 8, 1995, the Eighth Circuit, decided that even though all Petitioners in fact were "subject to" disciplinary deductions of less than a full pay period for any of the more than 40 violations of non-safety rules, "[t]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status." Pet. App.

at 8a. The court acknowledged, however, that an employee is considered hourly and entitled to overtime compensation if the employee's pay is subject to deductions for a violation of any other non-safety rule. Pet. App. at 9a.

The Eighth Circuit also ruled that one employee had, in fact, been subjected to a post-litigation, intentional non-safety disciplinary deduction of less than a full pay period, which would require him to be treated as a nonsalaried employee. Pet. App. at 9a. However, the Court concluded that even though "[a]rguably, the department's two-day pay deduction from [the employee] would require him to be treated as a nonsalaried employee," the Department could avail itself of the "window of correction." Pet. App. at 9a. The Department corrected the improper deductions by issuing a subsequent, post-litigation amendment to the Police Manual, even though this revision only changed the one specific disciplinary rule which had been violated. Pet. App. at 10a.

ARGUMENT

I. PERMITTING EVER-EXPANDING EXEMPTIONS FLOUTS THE FLSA HOURS-OF-WORK STANDARD AND HURTS LOW-WAGE WORKERS AND OTHER GROWING SEGMENTS OF THE WORKFORCE.

The FLSA's hours-of-work standard establishes the forty hour work week. The FLSA was enacted with a dual purpose. The 1938 Act was explicit that the first congressional purpose was to protect workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the

minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a).[1] The second purpose of the Act, the job creation goal, was highlighted by Justice Reed's 1941 opinion in Overnight Motor Transport v. Missel, 316 U.S. 572, 576 (1941).

> [The Court of Appeals] felt that one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours. We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and one half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though the hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan

1 See also, United States v. Darby, 312 U.S. 100, 109 (1941), Barrantine v. Arkansas Freight System, 450 U.S. 728, 739 (1981).

> from the beginning. . . . The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), at 4. The Senate Report No, 884, the companions House Report, 82 House Rep. 1452, 75th Cong. 1st Sess., at 14 and 15 (1937), and the Conference Report, 83 Cong. Rec. 9246, 9254 (1937), all spoke of maximum hours as a separate desirable object. Indeed the Act itself in setting up two sections of standards, § 6 for wages and § 7 for hours, emphasizes the duality of the Congressional purpose. 316 U.S. at 577-578. (emphasis added).

A. FLSA Exemptions Must be Read Narrowly.

This Court has emphasized that the "breadth of coverage" of the FLSA's overtime work rules is "vital to [its] mission" of establishing a national work week standard and that statutory exemptions to the Act should be narrowly construed.[2] An employer claiming an exemption must establish entitlement to it by clear, convincing and affirmative evidence.[3] The presumption must be that all workers are covered.[4]

2 Powell v. United States Cartridge Co., 399 U.S. 497, 516 (1950); Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959).

3 Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

4 Powell v. United States Cartridge Co., supra, 399 U.S. at 516; Arnold v. Ben Kanosky, Inc., 361 U.S. 388, 392 (1960).

The Eighth Circuit's ruling makes employer access to exemptions a virtual cakewalk; it could make evasion of the forty hour week commonplace.

B. Employer Abuse of the FLSA Exemptions Disproportionately Penalizes Low-Wage Workers.

In the 1940's business groups argued that all "white collar" workers should be exempt from the Act. The Department of Labor's Report and Recommendations of Presiding Officer Stein on October 10, 1940, discussed that idea --

> All of the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions -- that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by the proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common.

Today's employers remain driven toward treating all white collar workers as exempt in order to avoid paying employees overtime for working over forty hours in a week, and to avoid hiring more employees to do the extra work.

Recent real life examples of employer manipulation of the exemptions illustrate the point that low-wage workers are significantly impacted by this case.[5]

Example #1:
Maria is an assistant manager at a fast food restaurant. She works 72 hours a week for $300 salary. Her hourly rate is $4.16 an hour -- less than the minimum wage. Her employer classified her as a low-level supervisor and did not pay her overtime under the "executive employee" exemption.

Example #2:
Ralph, a convenience store clerk in Weslaco, Texas, was often the only employee on the premises in the evenings and on weekends. He fulfilled all duties in the store, from ringing up customers, stocking shelves, and closing up the store, often after midnight. As a "manager," he was classified by his employer as an "executive employee," and did not receive overtime payments.

Example #3:
Lucia is a garment worker who sews shirts for a sewing contractor. She supervises three other workers who also sew shirts alongside her. When her boss gets a big job, instead of hiring another three workers to get it done, she has to stay overnight three nights in a row and over a weekend to finish by the deadline. Her employer, who calls her a supervisor, misclassifies her

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5 These examples are from cases filed by legal advocates which resulted in settlements requiring that the parties' names and the litigation results remain confidential.

as an "executive" employee, and she receives no overtime pay.

The duties test applied to these cases contains a number of subjective elements, demands a comparative analysis of time spent on various activities, necessitates an evaluation of the degrees to which an employee has discretion, and requires subtle differences between management and working supervision. These elements of the test are difficult for judges, let alone low level, comparatively powerless, workers, to apply. The simpler salary basis test is a more accurate criteria of exempt status.

Low wage workers comprise a disproportionate share of the workforce. From 1979 to 1992, the low wage sector of the workforce grew an astounding 50%, now representing one in five workers.[6] Increasingly, workers classified as managers and administrators in growing industries such as retail and sales, are also finding themselves in low paying jobs. For example, the National Restaurant Association conducted a survey in 1994 which found that one-quarter of fast-food assistant managers earned less than $15,000[7] and from 1964 to 1992, supervisory employees in eating and drinking

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6 U.S. Department of Labor and U.S. Department of Commerce's Commission on the Future of Worker Management Relations, Fact Finding Report (May 1994). (Hereafter "Dunlop Commission Report").

7 Marc Linder, "Labor Department is Subverting Wage Law," in The National Law Journal, January 17, 1994.

establishments more than quadrupled, from 126,000 to 634,000.[8]

Low wage workers are also disproportionately women and members of racial and ethnic minority groups.[9] By the year 2005, women and racial minorities will be two-thirds of all new entrants to the workforce.[10] According to recent data from the U.S. Bureau of Labor Statistics, while women represent 48 percent of all managerial and professional workers, they are disproportionately working in lower paying jobs averaging 73 percent of the pay of men in managerial and professional jobs.[11] The pay differential is partially due to women tending to be concentrated in low-paying industries such as sales and retail jobs.[12]

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8 Marc Linder, "Closing the Gap Between Reich and Poor: Which Side is the Department of Labor On?", 21 New York University Review of Law and Social Change I, 22 (1993-94). U.S. Bureau of Labor Statistics, Bullet No. 2370, "Employment, Hours and Earnings," at 802-04 (1991).

9 U.S. Bureau of Labor Statistics, "The Earnings Ladder: Who's at the Bottom? Who's at the Top?" Statistical Brief 94-3(March 1994).

10 The "Dunlop Commission report" at 12.

11 U.S. Bureau of Labor Statistics, Current Population Survey, 1995 Annual Averages (Unpublished Data).

12 Conrad F. Fritsch & Kathy Vandell, Exemptions from the Fair Labor Standards Act: Outside Sales workers and Executive, Administrative, and Professional Employees in Minimum Wage Study Comm'n, Report of the Minimum Wage Study Commission, 245-248 (1981); Marc Linder, Ibid at 21.

The Eighth Circuit's ruling significantly impacts these low-wage workers in industries such as retail, food service, and sales, where the lines often merge between the work of entry-level workers and managers. Deliberate employer manipulation of the exemption, by merely deeming entry-level employees "exempt" as supervisors, even when they spend a good part of their time performing the same work as the people they supervise, permits the employer to avoid paying overtime, and indeed, avoid paying wages at all for the extra hours worked.[13] This dynamic flouts the purpose of the narrow executive exemption which recognized that the highest paid executives of a company had enough power (and wages) to dictate their own hours and working conditions.[14] The notion that assistant managers at fast-food restaurants and convenience store clerks have the requisite power to qualify them for the executive exemption as it was intended is absurd.[15] Again, the superior test of true exempt power, discretion and control is the salary basis test.

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13 The U.S. Department of Labor states in a 1940 report, "there is little advantage in salaried employment if it merely serves as a cloak for long hours and may well conceal excessively low hourly rates of pay." "The Stein Report" at 7 (1940).

14 Marc Linder, Ibid. at 17. ("executive connotations.")

15 Petitioners urge use of the "as a practical matter" test to determine the true nature of the employee's status. This use of the salary basis test would necessarily take into account the relative bargaining power of the employee and employer, and, in the case of the lower-level employees, recognize that the employer dictates the terms and conditions of work.

C. Mandatory Overtime and An Increasing Work Day Hurts Workers Contrary to the FLSA Worker Protection and Job Creation Goals.

Workers are being required to work longer hours for the same pay. Employers' need to stretch budgets is manifesting itself in a reconfiguration of the workforce, including "contracting out" certain job functions and hiring temporary workers in place of permanent employees[16], and lengthening the work day for those workers who are not the victims of mass layoffs and stay on as employees.[17] Researchers have established that Americans are spending more and more of their time working.[18]

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16 See, e.g., Richard S. Belows, "The Rise of the Contingent Workforce: The Key Challenges and Opportunities," 52 Wash. & Lee L. Rev. 863 (1995). See also, other articles in same volume, "Symposium on the Regulatory Future of Contingent Employment," 52 Wash. & Lee L. Rev. (1995). The rise of the "contingent" workforce creates an ease with which employers are able to manipulate shifts, job descriptions and job characterizations to minimize coverage of labor and employment laws. See, Jonathan P. Hiatt, "Policy Issues Concerning the Contingent Workforce," at 739,; Mary E. O'Connell, "Contingent Lives: The Economic Insecurity & Contingent Workers," at 889.

17 See e.g. Louis Uchitelle, "Fewer Jobs Filled as Factories Rely on Overtime Pay," in The New York Times, May 19, 1993; G. Paul Zachar, "Shortchanged: Many Firms Refuse to Pay for Overtime, Employees Complain," Wall Street Journal, June 24, 1996; Joan Rigdon, "Worn Out: Some Workers Gripe Bosses are Ordering Too Much Overtime," Wall Street Journal, September 29, 1994.

18 The Economic Policy Institute study by Case Western Reserve Assistant Professor Laura Lette-Guy and Harvard Professor Juliet Schor. Lette and Schor, "Assessing the Time Squeeze Hypothesis: Hours Worked in U.S. 1969-1989," 33 Indus. Rel. L. J. 25 (1994);

Juliet Schor's The Overworked American: The Unexpected Decline of Leisure[19] establishes the surprising fact that in the last twenty years the average employed American has seen his or her working hours increase by the equivalent of one month a year. This dramatic spurt has hit nearly everyone; men and women, professionals and low paid service workers, across every industry and in every occupation.

Total Annual Hours, Labor Force Participants

	1969	1987	Change 1969-1987
Market Hours			
All participants	1786	1949	163
Men	2054	2152	98
Women	1406	1711	305
Household Hours			
All participants	889	888	-1
Men	621	689	68
Women	1268	1123	-145
Total Hours			
All participants	2675	2837	162
Men	2675	2841	166
Women	2674	2834	160

This extra month's work per year decreases efficiency, increases stress on the worker, and leads to an unhealthy workplace.

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see also, Martin Moore-Ede, M.D., Ph.D., The Twenty-Four Hour Society: Understanding Human Limits In A World That Never Sleeps 1, 66-71 (1992) (explaining that human fatigue caused by working long or late hours accounts for many serious accidents, such as Three Mile Island, Exxon Valdez, and transportation accidents).

19 Juliet Schor, "The Overworked American: The Unexpected Decline of Leisure," Basic Books (1991), (hereafter Overworked).

Workers who are not in a position to bargain are forced to take the job as they find it, even if that means working long hours, with or without overtime pay. A recent radio advertisement on Spanish-speaking radio seeking 500 workers in West Texas for a job at a chicken processing plant in a Northern State described the job as "full time" and "permanent," but required workers to commit to working six days a week for twelve hours a day, Sundays "optional." If the worker were to take the job, it is difficult to imagine that she would be there for the long term; injuries and general burn out would likely result in a frequent turnover. The chicken processing company's strategy of recruiting from an agricultural worker community suggests that it expects a high turnover.[20]

The overtime provisions of the FLSA are designed to penalize employers whose individual employees work excessive hours, both to protect those employees working overtime, and to create jobs. The Eighth Circuit's countenance of employer abuse of exemption and creative misclassification of employees exploit the workers who are "lucky" enough still to have a job, and provide employers with an incentive not to hire additional workers. Low-wage workers and the unemployed suffer because they, the intended beneficiaries of the FLSA overtime provisions, lose out on the entry-level jobs that would have been created but for the FLSA violations.

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20 See Marc Linder, "I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries," 46 Case Western Reserve L. Rev. 33 (Fall 1995).

II. A NEW LOOK AT THE BRANDEIS BRIEF JUSTIFIES STRICT HOURS OF WORK RULES.

Louis Brandeis inaugurated the argument for an hours of work standard, in the first case in which this Court upheld a state statute limiting the hours of work.[21] Muller v. Oregon, 208 U.S. 412 (1908). The original "Brandeis Brief" persuasively argued that protective hours of work statutes should be upheld for the public health, public safety and general well-being of women and society as a whole. Relying on over ninety national and international medical studies and committee reports, Brandeis found that long hours of labor cause bad effects on health, safety, morals and the general welfare. He further discussed the economic benefits of short hours. Although the 1908 Brandeis Brief and Muller decision are hopelessly outdated with regard to their views that women are weaker and inferior to men, Brandeis' reasons for enforcing a strict hours of work statute hold true, even after eighty-eight years.

Health. In analyzing the harmful effects of long hours on health, Brandeis found that fatigue from long hours of work becomes chronic, resulting in the deterioration of health, which in turn makes individuals more susceptible to disease. Brief at 28.

The negative effect of long hours on health remains prevalent in today's society. Long working hours are related to stress and injuries at the workplace. Juliet B. Schor, The Piper Lecture: Worktime In Contemporary Context: Amending The Fair Labor Standards Act, 70 Chi. Kent L. Rev. 157, 161 (1994) (hereafter "Piper Lecture"). According to the International Labor Office, job stress, which costs the United States $200 billion a year, is "'one of the most serious health issues of the twentieth century.'" International Labor Office, World Labor Report at 65-67 (1993), quoted in Piper Lecture at 161.

Safety. Brandeis also analyzed the bad effect of long hours on safety, noting that workplace accidents most frequently occur at the end of the day or at the end of a long period of work due to long hours. Brief at 42.[22]

The negative effects of long hours on safety still exist in all industries. For instance, between 1985-1991, United States automobile factories, which have extremely high overtime hours, suffered a 460% rise in workplace injuries.[23]

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21 Appendix A contains a full chronology of the FLSA and the Salary Basis Doctrine.

22 "[L]ess [work] is done in the tenth hour, by reason of weariness, than in other hours; and the work of the last hour, like overtime work at night, weakens a person for the next day. It is this weariness that causes accidents to occur two or three times as frequently in the last hour as in other hours. . ." G. L. Bohn, Getting a Living, at 407, quoted in Brief at 44.

23 United Auto Workers New Directions Movement, Forced Overtime: Killing the American Dream (1994), quoted in Piper Lecture at 161 n. 34; see Bureau of Labor Statistics, U.S. Department of Labor, 41 Employment & Earnings 108 (1994) (stating that motor vehicle and car bodies production and non-supervisory employees worked approximately 8.7 overtime hours per week).

Family Life. Brandeis emphasized that longer hours encroach upon family life. Brief at 47.[24] Family life is the core of society, and the weakening of the forty hour workweek means a weakening of the most basic unit in society, the family.

In 1905, the shortening of working hours was different for women and men since free time for women was not "resting time", as it was for men, but time to do the housework and attend to family life. Brief at 58.[25]

Similarly, in 1991, approximately two-thirds of women with children are employed.[26] In 1987, women's household hours were 1123. Men spent 689 hours doing household work.[27] This leaves families with little non-work time. The more hours spent at

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24 A 1900 New York Bureau of Labor Statistics Report found that if both working parents do not have the time to give their children enough attention, their generation will suffer irreparable harm. Report of the New York Bureau of Labor Statistics at 69 (1900), quoted in Brief at 48-49.

25 Reports of the Factory Inspectors, The Working Hours of Female Factory Hands, at 111, 113 (Berlin 1905); Boris, Home to Work, (Cambridge University Press, 1994); Boris and Daniel and Homemade, (University of Ill. Press, 1989).

26 Overworked at 1, 20; Bureau of Labor Statistics Memo, "Marital and Family Characteristics of the Labor Force from the March 1990 Current Population Survey," at 4 table 15 (Oct. 1990)).

27 Id. at 35, table 2.3 and at 37 n. 40 (construing John P. Robinson, "Who's Doing the Housework?" American Demographics, 10, 12 (Dec. 1988)).

work, the less with the family. American men and women both need family time.

Economics. Brandeis argued that the economic aspects of shorter hours outweigh any possible benefits derived from longer hours. Brief at 65. Again relying on numerous national and international reports, Brandeis argued that output declines with long hours, and shorter hours increase productivity and improve quality.[28]

Just as Brandeis warned against the dangers of exempting specific trades from the hours of work standards eighty-eight years ago, a warning sounds now that any claimed exemptions from the national hours of work standard must be narrowly read and strictly applied. Brandeis concluded that exemptions of special trades from the hours of work standard subjected employees to injurious overwork and destroyed the intent of an hours of work standard. Brief at 86.

Brandeis was right.

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28 Id.; see, e.g., 1886 Commission du Travail, Report of the Sessions of Inquiry into Industrial Labor, at 65 (Brussels 1887), quoted in Brief at 68 (concluding that "everything which makes the worker more strong, more healthy . . . more intelligent, etc. (and these will be the results of greater leisure . . .), make him also more productive. . . [introducing reforms] indicates strongly that the final result will be a very great increase of production with a shorter time period for work."); Report of the British Chief Inspector of Factories and Workshops (1893), quoted in Brief at 75 ("[An] [a]rgument[] against overtime . . . [is] [t]hat the work done during overtime is not equal, in amount or quality, to that done during the regular time.")

III. EXEMPTIONS CAN SWALLOW THE RULE.

Interpreting exemptions broadly ignores Congresses' intent and undermines the national hours of work standard. The standard only works if nearly the entire society lives by it. The Eighth Circuit's exemption rules threaten to swallow the hours standard. It portends an expansion of the exempted class in relation to the covered class, especially as compared to the relationship between all employees and the small class of high paid executive, top staff administration and true professionals anticipated in 1937.

A simple example best exemplifies that a liberal exemption standard, which is difficult to enforce and easy to abuse, creates a much larger exempt class in relation to the size of the covered class, thereby jeopardizing the FLSA's goals of job creation and discouraging long hours by requiring extra pay.

A Final Example:

Consider a 103 person catering business. Three people are involved at the very top of the firm. The boss does everything and leads every project. She is clearly an executive. Her immediate assistant is in charge of the books, personnel and all administrative tasks. He is an administrative assistant with internal management discretion. The firm's main draw is an ice sculpturist, an artist to the core and a true professional. The three control their own work and time. Under the rules in force, the remaining 100 earn $6.00 per hour for 40 hours a week but are paid time and one-half, or $9.00 per hour, for overtime. The firm is fully employed, and

all employees work a full 40 hour week. When the holiday season begins, extra work comes in beyond that which the three top people can do on their own, and the firm faces an important economic decision. Management must sit down and decide whether to pay current employees $9.00 per hour for the extra work or hire new employees at the $6.00 rate.

Before the next holiday season, the administrative assistant hears that the rules on overtime are becoming more liberal. He learns that a method exists which achieves broader exemptions. The firm divides its work force up into 20 teams of 5 employees on each team. Each team has a worker designated "sergeant" who works with and leads the team. The 20 sergeants are now designated exempt from the hours of work standard, just like the top brass. A total of over 20 percent of the workforce is now exempt. Again the team is fully employed. Everyone is working full time. Again the new work comes in. Now the firm has 23 employees who are available to do the work without the overtime payment. The administrative assistant explains that now the 23 exempt employees can easily absorb the extra work, exclaiming now "its free work." The firm faces no pressure to pay overtime or hire more employees. The work force gets no additional pay for their extra effort and no new jobs are created.

IV. THE DECISION OF THE EIGHTH CIRCUIT SHOULD BE OVERTURNED.

This case raises a technical issue concerning the application of FLSA exemption rules and the "salary basis" pay docking doctrine.

A. The "Subject To" Rule: §541.118(a)(5).

The Eighth Circuit appears to create a dilemma between a "merely hypothetical rule" and an "only actual" rule. It then appears to adopt the "only actual" rule. However, the better test provides that salaried status is lost only when the employees are "subject to" docking as a practical matter. (See Solicitor General's Amicus Curiae in Opposition to Certiorari).[29]

If the Eighth Circuit's reading of the "subject to" provision were upheld, an employer could permanently maintain a detailed attendance[30] or disciplinary[31] code

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29 "[T]he Employer has the burden of proving that the employees are paid on a salary basis, e.g., by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances." See U.S. amici op. Cert. at 11. The employer did not carry this burden. See Petitioners' Brief.

30 In the private sector, the 29 C.F.R. § 541.118(a)(1), (2) and (3) rules on pay docking for part day personal absences continue to apply. The Eighth Circuit's "subject to" interpretation, of course, applies to that portion of the rule. This is significant because the result of the decision will impact the entire American workforce.

which subjects all employees to pay docking. The employer could then pay overtime wages only to those employees who were actually docked. This would lead to the obviously unintended result that employees who violate the rules and are actually docked would be entitled to overtime, while those who obey the rules would not receive such overtime. See Solicitor General's Brief in Opposition to Certiorari in Wisconsin v. Mueller, 54 F.3d 438 (7th Cir. 1995), cert. pending, (Case. No. 95-0586, January 10, 1996) at 2-4, and 6-7.

B. The "Window of Correction": 541.118(a)(6).

The Eighth Circuit's view of the "window of correction" would also lead to unintended results. An employer who deliberately makes deductions that are inconsistent with the salary basis test, and is then sued in an FLSA suit, could escape liability easily. Such a rule would rob the salary basis regulations of its teeth. See Solicitor General's Brief in Opposition to Certiorari in Martin v. Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992) at 30-32.

No employer should be allowed access to the "window of correction" unless the employer meets a burden of establishing that any deductions made were "inadvertent," that all deductions made were reimbursed as soon as they came to the employer's attention, and that the employer

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31 Both the part day docking and the disciplinary docking rule contain the "subject to" language. In the public sector, at least for the post-1991 period, disciplinary docking remains in force under 29 C.F.R. § 541.5d and § 541.118(a)(5).

has revised all of its rules, codes, policies, practices and procedures which leave no doubt that as a practical matter the affected employee will not be subject to such deductions in the future.

IV. CONCLUSION.

For the foregoing reasons, this Court should reverse the Eighth Circuit.

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APPENDIX

APPENDIX A

CHRONOLOGY ON FLSA AND THE "SALARY BASIS" DOCTRINE

1791. Philadelphia Carpenters First American strike for a ten hour day. (David R. Roediger and Philip S. Foner, Our Own Time 7 (Greenwood Press 1989)).

1834. Average work week 75 to 90 hours for laborers; journeymen push for 60 hour week. (W.S. Woylinsky, "Hours of Labor" in Encyclopedia of Social Sciences, Vol. III (1935)).

1840. President Van Buren issues executive order granting a ten hour day to government employees engaged in manual labor. Id. at 40.

1830's-50's Pressure to shorten work week for safety and protective reasons increases. Moved to 3150 hours per year. (Zeisel, "The American Work Week, 1850-56," 81 Monthly Labor Review 23-29 (1958)).

1868. Eight hour day for federal contractor enacted. (Roediger at 87).

1876. U.S. v. Martin, 94 U.S. 400 (1876). Vitiates 1868 eight hour day law for federal contractors by allowing individual agreements.

1890s. Women's action groups, led by Florence Kelly and Grace Abbott, push to limit hours of work. (Eileen Boris, Home to Work 81-122 (Cambridge University Press 1994); and Hunnicut, Work Without End, 20-23 (Temple University Press 1988)).

1898. Holden v. Hardy, 169 U.S. 366 (1898). Upholds eight hour day law for mine safety.

1905. Lochner v. New York, 198 U.S. 45 (1905). Strikes down limits on hours of work on freedom of contract grounds.

1907. Federal Hours of Service Act caps hours for railroads on safety rationale.

1908. Muller v. Oregon, 208 U.S. 412 (1908). Upholds hours of work regulation for women -- original "Brandeis Brief" filed.

1914. Howley v. Walker, 232 U.S. 718 (1914). Upholds women's hours law.

1915. F. Frankfurter and J. Goldmark, "Brief for the Defendant in Error; The Case for Shorter Work Day," (U.S. Supreme Court, Oct. Term (1915)).

1916. Federal Adams Act enacted eight hour day for railroads.

1917. Bunting v. Oregon, 243 U.S. 426 (1917). Upholds 10 hour day and seems to question Lochner; Wilson v. New York, 243 U.S. 332

(1917). Railway hours law is constitutional on safety grounds.

1920's. The five day week movement. (Hunnicutt at 18; and "Attitude of Certain Employers to the Five-Day Week," Monthly Labor Review, 23 (December 1923)).

1923. Adkins v. Childrens Hospital, 261 U.S. 525 (1923). Invalidates minimum wage for women; questions worker protection laws.

1935. Congress nearly enacts Black-Connery Bill which would have outlawed employing anyone over thirty hours per week. Postal Act of 1935 40 hour work week for postal employees. (Jonathan Grossman, "Fair Labor Standards Act of 1938," Monthly Labor Review 101, 25-26 (1978)).

1936. Moorehead v. New York, 298 U.S. 587 (1936) Invalidates state and federal wage and hour laws.

1937. West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Upholds state minimum wage law.

June 25, 1938. FLSA, 29 U.S.C. §201 et seq. Enacted. Sponsored by 30 hour work week advocate Senator Hugo Black. Excludes Public Employees. (Grossman at 28).

1939. Wage and Hour Administrator presses view that "white collar" employees "as such are entitled to

benefits of the act." Coverage is presumed. Exemptions for "executives, administrators and professionals" are the true exceptions to the rule, are rare, and only allowed if employer meets heavy burden. See Wage and Hour Interpretative Bullet, No. 1, par. 5. (Jt. App. at 29).

April 1940 — 5 Fed. Reg. 4405 (1940) First regulatory annunciation of "salary basis" rule. (See, Jt. App. at 37).

October 10, 1940. — "Stein Report." (Jt. App. 20).

1941. — U.S. v. Darby, 312 U.S. 100 (1941). FLSA is constitutional.

1943-1945 — War Labor Board era special rule allows discipline to accommodate limits on labor supply and production demands of war. (Jt. App. 37-38).

August 24, 1944. — Wage and Hour Administrator Release A-9. Explains special war time rule. (Jt. App. at 37-38).

1945. — Phillips v. Waling, 324 U.S.,490, 493 (1945) Supreme Court rules FLSA exemptions narrowly construed.

1948. — Bauler v. Pressed Steel Car. Co., 81 F. Supp. 172 (N.D. Ill. 1948), aff'd 182 F. 2d 357 (7th Cir. 1950). Finds that a sergeant security guard at a war materials plant is non-exempt.

June 30, 1949. — "Weiss Report." War Labor Board era special rule on discipline dropped. Anti-docking rules revived. (Jt. App. at 39).

March 9, 1954. — Notice of Proposal Rule Making on 29 C.F.R. 541.118(a). Proposes current 541.118(a)(6), window of correction language, but says, in part, "penalties imposed for infractions of safety rules or for other major disciplinary reasons, will not affect salaried status." 19 C.F.R. 1321 (1954).

July 17, 1954. — Final rule adopted with exact current wording, stating "on the basis of the comments the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision governing safety rules has been clarified." This rule remains unchanged to this day, except for the addition of the special exception for part day docking in the public sector adopted in 1991. 19 Fed. Reg. 4405 (1954).

October 15, 1966. — FLSA extended to public schools, hospitals, nursing home and local transit. 80 Stat. 83 (1966).

1968. Maryland v. Wirtz, 392 U.S. 183 (1968). Upholds constitutionality of 1966 extension.

1973. Employees of Department of Public Health v. Missouri, 411 U.S. 279 (1973). Disallows FLSA suits in federal court against state government by private parties leaves local governments, DOL suits, and state court suits by private parties.

May 1,
1974. FLSA extended to most state and local government employees. Includes Section 217(k) special schedules for public safety which extends the 40 work week to "the lesser of 216 hours or the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Stands Act of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975." P. 88 Stat. 55 (1974). See, H.R. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2811.

April 1,
1975. Current salary level adopted on interim basis. 40 Fed. Reg 27640 (1975).

1976. National League of Cities v. Usery, 426 U.S. 833(1976), holds FLSA public sector coverage unconstitutional.

April 7,
1978. Notice of Proposed Rule Making to increase salary level. 43 Fed. Reg 3779 (1978).

January 13,
1981. Final rule issued revising salary levels at close of Carter Administration. 46 Fed. Reg. 3013 (1981).

February 12,
1981. Final rule on salary level stayed by Reagan administration. 46 Fed. Reg. 11972 (1981).

March 3,
1982. Jones v. Donovan, Slip Op. 79-2973, 25 W.H. Cases 380, aff'd per curium, 675 F.2d 1340 (D.C. Cir. 1982). Held that the 186 hour 28 day work period initially established by DOL has failed to consider state and local employees as required by 207(k). DOL's recomputation for 1975 resulted in a 171 hour trigger for law enforcement.

February 19,
1985. Garcia v. San Antonio, 469 U.S. 528 (1985), reverses National League of Cities reinstating public sector coverage.

November 13,
1985. 1985 Amendments accommodate special concerns of public sector, reemphasize 7(k) schedule, authorize comp. time, clarify volunteers, exclude some public employees from coverage, and retroactively delay impact of Garcia, granting a years delay for public employers to comply. S. Rep. No. 99-159, 1985, U.S.C.C.A.N. 651. 99 Stat. 787 (1985).

November 19,
1985. Advance Notice of Proposed Rule Making. Continues indefinite stay; invites comments on Part 541. 50 Fed. Reg. 47696 (1985).

March 22,
1986. Comment period closes. Over 200 comments received. Majority from private sector; one third from trade associations within retail and service industry. Focus on salary level and duties test for professionals. Little or no comment on public sector, salary basis test or window of correction.

January 9,
1987. Special Enforcement Policy In Public Sector. DOL does not seek enforcement for part day docking violation in public sector. All other "salary basis" still applies. Private enforcement still open.

June 16,
1987. DOL issues Final Public Agency Rules under the 1985 Amendments. 52 Fed. Reg 2032 (1987).

September 10,
1987. DOL Policy Review Board looks at 1985 Part 541 Advance Notice.

1988. No decision. Policy debate continues within DOL and Administration.

Early
1989. Thirteen governors write DOL on concerns with FLSA.

July 27,
1989. DOL Secretary writes to Governors reaffirming present regulations and interpretations but requesting specific recommendations on Part 541, through 1985 ruling making process.

Late 1989
to early
1990. Twelve governors respond. Raise salary basis concerns among others.

November 15,
1990. Public Law 101-583 exempts computer professionals. Results in computer professional revision in Part 541.

July 11,
1990. 9th Circuit Abshire, 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785(1991), decision applies "salary basis" test, generates comment.

February 27,
1991. Interim rule on computer professionals issue. 56 Fed. Reg. 39 (1991).

May 6,
1991. Eleven governors write Secretary request change in salary basis and administrative duties tests in public sector.

August 2,
1991 Legislation introduced on public sector "salary basis." S.1670.102d Cong. 1st Sess. (1991). Cong. Rec. S. 12,253.

August 16,
1991. DOL's 2nd Cir. Brief in Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992).

September 6,
1991. Interim rule revises "part day docking" rule in public sector, maintains remainder of salary basis test. (Pet. App. 86a.) 56 Fed. Reg. 45824 (1991).

November 6,
1991. Comment period closes. 124 Cities, 46 counties and 29 governmental associations comment in favor; 25 public employee associations/unions comment opposed. No one presses window of corrections. Disciplinary docking rule raised and left in place.

November 20,
1991. 2nd Cir. Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992), private sector DOL litigation decision emphasizes "subject to" salary basis rule and limits on window of correction. DOL strict position upheld.

1991-
1992. Legislation introduced in Congress on these issues; none becomes law.

May 7,
1992 Legislation introduced on public sector salary basis. H.R. 5112, 102d Cong., 2d Sess. (1992).

July 16,
1992. Sol. Gen. Supreme Court Opp. Cert. in Malcolm Pirnie, 949 F.2d. 611 (2d Circuit 1991), cert. denied, 113 S.Ct. 298(1992).

July 30,
1992. DOL Secretary Martin prepares and sends to Congress legislation to make regulatory revisions in public sector salary test in proposal of September 1991 retroactive. No sponsor found; bill not introduced.

July/August
1992 Legislation introduced on public salary basis. S. 3089.

August 19,
1992. 29 CFR 541.5d (1992) 57 Fed. Reg. 37666 (1992). Final Rule. (Pet. App. 184a).

September 16,
1992. House Subcommittee on Labor Standards hearing on application of Part 541 to public sector. Public employees object to DOL modifications; employers support DOL; National Association of Counties, National Governors Association, NPELRA testify do not emphasize disciplinary docking or window of correction issues. Private sector hearing discussed but never held. See also S. 3222.

November 9,
1992. Final rule on computer operators. 57 Fed. Reg. 197 (1992).

November 12,
1992. DOL considers staff drafts on "salary basis" rulemaking initiatives. No final action taken.

February
1993 Senate "salary basis" hearings.

March
1993. Legislation introduced in 102d Congress to revise salary basis; H.R. 1309 Rep. Andrews (D-N.J.).

May
1993. Ten Governors write DOL on "salary basis".

July 1,
1993. House Labor Standards Subcommittee hearings on "salary basis."

August 17,
1993. DOL 6th Cir. Brf. Reich v. Pierce, 1994 U.S. App. LEXIS 36194 (6th Cir. 1994).

August
1993. Legislation, S. 1354, introduced to revise "salary basis" test.

September
1993. OMB and DOL study on Part 541.

February/March
1995 Public sector "salary basis" legislation. H.R. 946 and S. 530.

April 11,
1994. Governor Wilson (Cal.) writes Secretary Reich requesting "salary basis" rulemaking as requested to Governor's Association in August 1993.

October 5,
1994. 9th Circuit SEIU v. San Diego, 35 F.3d 483 (9th Cir. 1994), voids pre-1991 salary docking.

November 14,
1994. Regulatory Agenda notice. Announces schedule for re-consideration of Part 541. Refers to salary level as "sorely out of date." 59 Fed. Reg. 57130 (1994).

December
1995 "Salary basis" and flex time legislation introduced. H.R. 2723.

January 17,
1995. DOL's 9th Cir. amicus in SEIU v. San Diego, 35 F.3d 483 (9th Cir. 1994).

May 8,
1995. Regulatory Agenda. Re-published November 1994's Part 541 notice verbatim. 60 Fed. Reg. 234544 (1995).

September 6,
1995. Congress enacts special public sector Court Reporter rules. P.L. 104-26 (1995).

November 28,
1995. Regulatory Agenda. May's Part 541 notice deleting "sorely out of date" reference to salary level. 60 Fed. Reg. 59608 (1995).

January 10,
1996. Sol. Gen. Supreme Court Opp. Cert. in Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995).

January 23,
1996 FLSA, salary basis and docking applies to Congress. P.L. 104-1 (1995).

May 13,
1996. Regulatory Agenda. Republishes Part 541 notice with 1997 deadlines. 61 Fed.Reg. 23238 (1996). (Jt. App. 43).